



## **ISSUE**

The issue is whether OWCP properly denied appellant's claim for wage-loss compensation for total disability from work commencing March 12, 2018 after her wage-loss compensation and schedule award benefits were terminated for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On March 17, 2014 appellant, then a 47-year-old lead clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2014 she injured her neck, shoulder, and back when she lifted soda cases in the stockroom while in the performance of duty. She stopped work on that date and returned on August 6, 2014. OWCP accepted appellant's claim for neck and lumbar sprains. It subsequently expanded its acceptance of her claim to include aggravation of cervical and lumbar intervertebral disc disorder with myelopathy and lumbar spondylosis with myelopathy. On April 15, 2015 appellant stopped work again. OWCP paid her wage-loss compensation and placed her on the periodic rolls, effective May 31, 2015.

OWCP determined that a conflict in medical opinion existed between Dr. Fanourios I. Ferderigos, a Board-certified orthopedic surgeon serving as an OWCP second opinion examiner,<sup>4</sup> and Dr. Kevin Scott, a Board-certified orthopedic surgeon and appellant's treating physician,<sup>5</sup> regarding whether she was capable of full-time sedentary-duty work. It referred her, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict. In a September 1, 2015 report, Dr. Elkins noted his review of the SOAF and appellant's medical records. On examination of the cervical and lumbar areas of her spine, he observed tenderness to the slightest touch. Dr. Elkins diagnosed mild-to-moderate symptoms magnification and pain accentuation, bulge in the lumbar region, disc bulges in the neck at multiple levels, and chronic neck and low back pain. He opined that appellant was capable of full-time, sedentary duty. Dr. Elkins completed a Form OWCP-5c, which indicated that she was capable of working sedentary duty with restrictions of sitting up to six hours per day, reaching above the shoulder up to three hours per day, walking, standing, twisting, bending and stooping, and pushing, pulling, and lifting less than 10 pounds up to two hours per day, and squatting, kneeling, and climbing up to one hour per day.

On September 30, 2015 the employing establishment offered appellant a permanent, full-time, light-duty position as a modified clerk-cashier, effective October 5, 2015, based on Dr. Elkins' September 1, 2015 report.<sup>6</sup> The physical requirements included sitting up to six hours per day, reaching above the shoulder up to three hours per day, walking, standing, twisting,

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<sup>4</sup> In a June 5, 2015 report, Dr. Ferderigos reviewed appellant's history and provided examination findings. He opined that she continued to suffer from her accepted disc protrusion injuries and that the aggravation of her lumbar spondylosis was permanent. Dr. Ferderigos completed a work capacity evaluation (Form OWCP-5c) indicating that appellant could work full-time sedentary duty.

<sup>5</sup> In a July 8, 2015 letter, Dr. Scott noted his disagreement with Dr. Ferderigos' opinion and reported that appellant remained totally disabled as a result of the March 16, 2014 employment injury.

<sup>6</sup> The job duties required answering consumer questions, assisting customers, operating a cash register, taking inventory, and performing housekeeping duties.

repetitive moments of the wrists and elbows, and pushing pulling, and lifting up to two hours per day, and squatting, kneeling, and climbing up to one hour per day.

On October 7, 2015 appellant declined the job offer and provided an October 7, 2015 letter by Dr. Scott who opined that she remained totally disabled.

In a letter dated November 24, 2015, OWCP informed appellant that the offered modified clerk-cashier position was suitable in light of her work restrictions. Appellant was advised that she had 30 days to accept the position or provide a valid reason for refusing suitable work.

In a December 30, 2015 letter, OWCP advised appellant that she had 15 days to accept the offered job position and that, if she did not do so, her entitlement to wage-loss and schedule award compensation benefits would be terminated pursuant to section 8106(c) of FECA.

By decision dated February 17, 2016, OWCP terminated appellant's wage-loss compensation and schedule award benefits, effective February 18, 2016, because she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It informed her that her claim remained open for medical benefits.

On April 29, 2016 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

On June 3, 2016 appellant accepted the modified job offer for the clerk-cashier position. She returned to work on June 6, 2016.

By decision dated June 28, 2016, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record. It determined that the request was untimely filed as it was postmarked on April 29, 2016 more than 30 days after its February 17, 2016 termination decision. After exercising its discretion, OWCP further found that the underlying issue in the case could equally well be addressed through the reconsideration process.

Appellant continued to receive medical treatment and receive medical benefits.<sup>7</sup>

On September 21, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for disability during the period March 12 through September 30, 2018.

In a September 24, 2018 development letter, OWCP informed appellant that the documentation received to date was insufficient to establish her claim for wage-loss compensation for the period March 12 through September 30, 2018. It advised her of the type of medical evidence needed to establish her disability claim and afforded her 30 days to submit the necessary evidence.

Appellant subsequently submitted a report dated April 10, 2018 by Dr. Bharatkumar Patel, a family practitioner, a report dated June 18, 2018 by Dr. Andres Velasco, a Board-certified family practitioner, and a September 19, 2018 progress note and Form OWCP-5c by Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, regarding treatment for neck and lumbar pain following the March 16, 2014 employment injury. OWCP also received an August 27, 2018 narrative report by

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<sup>7</sup> On July 1, 2018 the employing establishment terminated appellant's employment.

Dr. Evan Zimmer, a Board-certified psychiatrist, who treated appellant for anxiety, depression due to physical illness, and insomnia secondary to depression with anxiety.

By decision dated December 17, 2018, OWCP denied appellant's claim for wage-loss compensation due to total disability for the period March 12 through September 30, 2018.

On January 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 17, 2019.

OWCP received narrative reports dated November 6, 2018 and September 15, 2020 by Dr. Zimmer and an April 25, 2019 report by Dr. Conrad Tamea, a Board-certified orthopedic surgeon, regarding treatment for complaints of recurrent neck pain. Appellant also submitted June 10, 2019 lumbar and cervical spine magnetic resonance imaging (MRI) scans.

By decision dated August 15, 2019, OWCP's hearing representative affirmed the December 17, 2018 decision. She found that appellant was not entitled to wage-loss compensation because OWCP had previously terminated appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2).

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.<sup>8</sup> OWCP regulations provides that after termination of compensation under section 8106(c) of FECA a claimant has no further entitlement to compensation under sections 8105, 8106, and 8107 of FECA.<sup>9</sup> However, the claimant remains entitled to medical benefits as provided by 5 U.S.C. § 8103.<sup>10</sup> Section 8106(c) of FECA serves as a penalty provision, which may bar an employee's future entitlement to compensation for the same injury based on a refusal to accept a suitable offer of employment.<sup>11</sup>

OWCP's procedures provide, in pertinent part, that, if the claimant does not accept a suitable work offer, the claims examiner should prepare a formal decision which provides full findings of fact as to why the claimant's reasons for refusing the job are deemed unacceptable and terminate compensation under section 8106(c)(2) of FECA as of the end of the roll period. Such a decision should not be modified even if the claimant's medical condition later deteriorates and he or she claims a recurrence of disability.<sup>12</sup>

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<sup>8</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>9</sup> 20 C.F.R. § 10.517.

<sup>10</sup> *Id.*

<sup>11</sup> *E.W.*, Docket No. 19-1711 (issued July 29, 2020); *Joan F. Burke*, 54 ECAB 406 (2003); *Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>12</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.6 (June 2013).

## ANALYSIS

The Board finds that OWCP properly denied appellant's claim for wage-loss compensation for total disability from work commencing March 12, 2018 after her wage-loss compensation and schedule award benefits were terminated for refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained neck and lumbar injuries as a result of a March 16, 2014 employment injury. In a February 17, 2016 decision, it terminated her wage-loss compensation and schedule award benefits, effective February 18, 2016, because she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). Appellant subsequently accepted the light-duty position and returned to work at the employing establishment on June 6, 2016. She stopped work again in March 2018 and filed a claim for wage-loss compensation for disability from March 12 through September 30, 2018.

The Board finds that OWCP properly determined that the February 17, 2016 decision terminating appellant's compensation for refusing suitable work served as a bar to any subsequent monetary compensation as a result of the March 16, 2014 employment injury.<sup>13</sup> As noted above, section 8106(c) of FECA provides that an employee who refuses suitable work is not entitled to further compensation for total disability or permanent impairment.<sup>14</sup> Because OWCP terminated appellant's compensation due to her refusal of suitable work, effective February 18, 2016, she is barred from future entitlement to wage-loss compensation for her March 16, 2014 employment injury.<sup>15</sup> The Board therefore finds that OWCP properly denied her claim for disability compensation.

On appeal, counsel argues that OWCP improperly denied appellant's wage-loss compensation claim based on a refusal of suitable work because she subsequently returned to work. The Board has found, however, that the fact that a claimant returns to work after compensation is terminated for refusing suitable work, does not change the fact that she refused suitable employment and is, accordingly, barred from future entitlement to wage-loss compensation or schedule award benefits.<sup>16</sup>

## CONCLUSION

The Board finds that OWCP properly denied appellant's claim for wage-loss compensation for total disability from work commencing March 12, 2018 after her wage-loss compensation and

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<sup>13</sup> See *A.L.*, Docket No. 17-1975 (issued August 21, 2018) (appellant was not entitled to wage-loss compensation after OWCP had terminated her wage-loss and schedule award compensation benefits for refusal of suitable work); see also *A.N.*, Docket No. 16-0230 (issued April 4, 2016) (OWCP properly denied a claimant's recurrence of disability claim on the basis that he or she was not entitled to compensation due to his prior refusal of suitable work).

<sup>14</sup> *Supra* notes 7 and 8.

<sup>15</sup> *T.B.*, Docket No. 17-1761 (issued June 6, 2018); *E.M.*, Docket No. 09-0039 (issued March 3, 2009).

<sup>16</sup> See *I.C.*, Docket No. 13-254 (issued April 12, 2013) (OWCP properly vacated a March 14, 2012 decision accepting a claimant's February 23, 2012 recurrence of disability claim because she was no longer entitled to further wage-loss compensation after OWCP terminated her wage-loss compensation benefits on the grounds that she refused an offer of suitable employment under section 8106(c)(2)); *Henry P. Gilmore*, 46 ECAB 709 (1995) (employment obtained after neglect of suitable work does not justify resumption of compensation for wage loss).

schedule award benefits were terminated for refusal of suitable work, pursuant to 5 U.S.C. 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board